Supreme Court, U.S.
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In The Supreme Court of the United States

October Term 1995

RICHARD BERT ALLENDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States District Court, Southern District of Indiana, Indianapolis Division and the United States Court of Appeals for the Seventh Circuit erred in finding that Application Note 7 to United States Sentencing Guideline § 2F1.1 can be reasonably interpreted to allow the inclusion of interest a victim could have earned on its loans in calculating the amount of loss to the victim for the purpose of determining the proper Federal Sentencing Guideline Offense Level.

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Other Authority

United States Sentencing Guidelines,
§ 2F1.1, Application Note 7 . 2,6,7,9

Title 18, United States Code,
§ 1254(1) 1,2

Title 18, United States Code,
§ 1344 2,3,5

The Petitioner, Richard Bert Allender, respectfully prays that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit filed in the above-entitled proceedings on August 4, 1995 and September 19, 1995.

OPINIONS BELOW

The August 4, 1995 opinion of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of the United States District Court is unreported. Copies of the district court judgment, Cause No. 93 CR 79, the Court of Appeals Opinion, and the September 13, 1995 Order of the Court of Appeals denying said Richard Bert Allender's petition for rehearing and suggestion for rehearing en banc, Number 94-3200, are reprinted and are part of the Appendix.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was filed on August 4, 1995. An Order denying Allender's petition for rehearing and suggestion for rehearing en banc was thereafter filed on September 19, 1995. This Court's jurisdiction is premised upon Title 18, United States Code, § 1254(1), which provides for review of decisions of the Courts of Appeals by Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 1344, pertaining to "Bank Fraud" provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice --
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

United States Sentencing Guideline 2F1.1, Application Note 7, pertaining to Valuation of Loss (Larceny, Embezzlement and other forms of Theft) provides that:

> "Loss is the value of money, property or services unlawfully taken; it does not, for example, include interest the victim

could have earned on such funds had the offense not occurred."

STATEMENT OF THE CASE

On December 7, 1993, a Superseding Indictment was filed, wherein Allender was charged with ten (10) counts of Bank Fraud in violation of Title 18, United States Code, § 1344.

On April 25, 1994, after a jury trial, Allender was found guilty of eight (8) counts of Bank Fraud.

By way of background, this Court is advised that the First State Bank of Morgantown, Indiana, is a federally insured financial institution. Title 18, United States Code, § 1344 makes it illegal to knowingly defraud or use false or fraudulent pretenses to obtain money from a financial institution.

Allender obtained a series of nine loans from First State Bank using various false statements. Five of these loans were obtained by forging the signature of Ruth Howell, a longtime family friend and previous Morgantown resident.

The first loan in the amount of $15,000.00 was taken out on September 23, 1989. Allender forged Howell's name on a promissory note and again on the disbursement check payable solely to Howell. The second loan was disbursed on October 25, 1989, in the amount of $26,000.00. Allender again forged Howell's

signature on this loan, but was also a co-signor. Part of the proceeds of this second loan were used to pay off the first loan.

The next three loans, dated April 23, 1990 ($25,000.00), October 20, 1990 ($23,000.00), and April 18, 1991 ($19,000.00), were obtained in a fashion similar to the second loan, also without Howell's knowledge or consent, and were renewals of the second loan. After the last of these loans went into default, the bank charged off the balance.

On January 15, 1990, Allender used the name of Darren Whiteside to take out a loan of $24,000.00. Whiteside, a social acquaintance of Allender, had no business relationship with First State Bank. As with the Howell loans, this loan purported to bear the signature of both Whiteside and Allender. Whiteside testified that he had not authorized this loan. In addition, the collateral listed on the loan was not owned by either Whiteside or Allender. It did not exist. The bank charged off this loan too.

Finally, Allender secured three other loans by pledging collateral (heavy equipment) that did not exist. Two of these loans purported to bear the signature of Allender's father. Allender admitted to signing without his father's knowledge. Each of these loans went into default and they were charged off by the bank.

After an FBI investigation uncovered these and other suspicious loan deals involving Allender and First State Bank,

Allender was charged with violating Title 18, United States Code, § 1344, the Bank Fraud statute. The superseding indictment originally contained ten counts, but was reduced to nine after the district court granted, in part, Allender's motion to dismiss certain counts as multiplicitous. Of these nine counts (contained in the amended superseding indictment), Allender was convicted of eight counts. He was acquitted of count five involving the Darren Whiteside loan.

Numerous issues were raised on direct appeal. The most substantial argument, pertaining to the improper inclusion of interest in the loss calculation for sentencing purposes, brought about a disagreement between two panels of the United States Court of Appeals for the Seventh Circuit. For that reason, it is presented to this Court for consideration.

At sentencing, the district court determined that the total offense level was 19, that the Criminal History Category was IV, and that the Imprisonment Range was 46 to 57 months. Allender was thereupon sentenced to a term of imprisonment of 51 months. He is presently incarcerated at the Federal Prison Camp, Terre Haute, Indiana.

As part of his direct appeal, Allender contended that the district court erred in including interest due under these loans in the calculation of loss and that his sentence was improperly arrived at.

In its August 4, 1995 decision, the United States Court of Appeals for the

Seventh Circuit affirmed the district court's judgment in all respects.

On September 19, 1995, all of the judges on the original panel voted to deny the petition for rehearing and suggestion for rehearing en banc filed on behalf of Allender.

REASONS RELIED UPON AND ARGUMENT IN SUPPORT OF PETITIONER'S REQUEST FOR ISSUANCE OF A WRIT OF CERTIORARI

Valuation of loss is reviewed under the clear error standard and the proper interpretation of the sentencing guidelines is subject to de novo review. But, when

> "an appeal raises a purely legal question as to the proper interpretation of the sentencing guideline, appellate review is plenary".

United States v. Hatchett, 31 F.3d 1411, 1418 (7th Cir. 1994).

The issue of loss valuation requires an interpretation of Application Note 7, § 2F1.1 of the United States Sentencing Guidelines which states in pertinent part:

> 7. Valuation of loss is discussed in the commentary to § 2F1.1 (Larceny, Embezzlement, and other forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it

> does not for example, include interest the victim could have earned on such funds had the offense not occurred.

The wording of Application Note 7 does not state that any distinction is to be made between types of interest based on the level of certainty with which interest was due. If such an interpretation were intended the commentary drafters would have used different language and would likely have included a very specific exception pertaining to cases where there is an enforceable agreement to pay a calculable sum. Since they did not, the interest Allender challenges here should have been excluded from the district court's loss calculation.

In United States v. Clemmons, 48 F.3d 1020, 1025 (7th Cir. 1995), a different panel of the United States Court of Appeals for the Seventh Circuit determined that all future interest should be excluded from calculations of loss under § 2F1.1 of the United States Sentencing Guidelines, adopting a position more closely in line with Allender's contention.

The Clemmons panel concluded that failure to receive the promised interest is not a loss at all, but a frustrated expectation.

In Clemmons, 48 F.3d 1020 at 1025, the panel referred to and followed a United States Supreme Court decision holding that a Court of Appeals is constrained to follow the Sentencing Commission's commentary in the form of an application note unless it

is inconsistent with the guideline itself. Stinson v. United States, ___U.S.___, 113 S.Ct. 1913, 123 L.Ed.2d (1993).

The Clemmons panel found no such inconsistency between the commentary and the guideline.

The panel also considered the position taken by the court in United States v. Lowder, 5 F.3d 367 (10th Cir. 1993), that the commentary applied only to opportunity cost, and not to interest or earnings that were promised as part of a fraudulent scheme.

The Lowder court relied upon the rationale presented in United States v. Jones, 933 F.2d 353 (6th Cir. 1991).

In Jones, it was held that in the case of credit card fraud, interest on the principal amount of the fraud should be included in calculating the offense level. The rationale given was that the credit card issuer "lost the use of the money that should have come back to it".

The Clemmons panel found that result to be in direct conflict with the commentary in Application Note 7 and found that there is no basis for distinguishing between the use of the money that should have come back to it and interest the funds would have earned had the offense not occurred, i.e. the opportunity cost.

The Clemmons panel also stated that the degree of certainty with which defrauded investors expected a return on their investment is not a significant

distinction.

Finally, the panel stated that the failure to receive the promised interest is not a loss at all, but a frustrated expectation.

The true economic loss is the opportunity cost of the loss of the principal amount and that is specifically excluded from computation of the loss by Application Note 7, citing United States v. Bailey, 975 F.2d 1028, 1030-1 (4th Cir. 1992).

The Clemmons panel thereupon vacated the district court's sentence and remanded the case for resentencing with directions that the district court use the out of pocket principal amount in the loss calculation under § 2F1.1 of the United States Sentencing Guidelines.

CONCLUSION

The Seventh Circuit panel, in deciding Allender, adopted the very different position that if the victim had a reasonable expectation of receiving interest from the transaction that interest should be included in the loss calculation. United States v. Goodchild, 225 F.3d 55, 66 (1st Cir. 1994).

The Allender panel stated that it is implied in the language of Application Note 7 that loss is the value of the thing stolen, whether it be money, property, or services.

As part of its reasoning the Allender panel stated that in the context of a loan agreement, the thing itself or property includes both the principal and the agreed-upon interest. "But for the promise to pay interest the bank would not have made the loan." It also stated that "where there is an agreement to pay a calculable sum, all speculation disappears".

It is Allender's position that the Clemmons panel prudently constrained itself to follow the specific language of the Sentencing Commission's commentary in Application Note 7 in accordance with the decision in Stinson v. United States, ___U.S.___, 113 S.Ct. 1913, 123 L.Ed. 598 (1993).

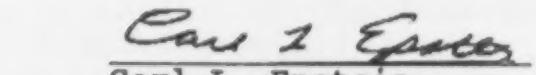
The Allender panel erred in speculating that the drafters of Application Note 7 intended an exception allowing inclusion of interest in a loss calculation where there is an enforceable agreement and in thereby disregarding the Supreme Court's ruling regarding construction of a Sentencing Commission commentary.

The commentary drafters did not use different language specifically stating an exception in the case of an enforceable agreement to pay a calculable sum, nor did they use language stating that interest should be included [in these loss calculations] if the victim had a reasonable expectation of receiving interest from the transaction.

For the foregoing reasons, Petitioner prays that this Petition for Writ of

Certiorari will be granted, and that thereafter, the judgments of the Court of Appeals and the District Court will be reversed and this case will be remanded for further proceedings.

Respectfully submitted:



Carl L. Epstein
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, CARL L. EPSTEIN, a member of the Bar of this Court, hereby certify that on this 11TH day of December, 1995, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first-class postage prepaid, to James M. Warden, Office of the United States Attorney, 46 E. Ohio Street, United States Courthouse, Indianapolis, Indiana 46204, counsel for respondent herein and to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

Carl L. Epstein